

BRIEF IN SUPPORT OF PETITION.

The opinion of the Circuit Court of Appeals is to be found on page 63 of the record.

The judgment of the Circuit Court of Appeals on petition to review was entered on July 24, 1940 (Record p. 80).

The petition for rehearing was denied on September 4, 1940 (Record p. 91).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED.

The question presented is stated in the petition.

STATEMENT.

The facts and the reason relied upon for the issuance of the writ appear in the petition.

ARGUMENT.

The Court of Appeals in its opinion held:

“The **pre-divorce** agreement of May 12, 1909, created a continuing, legal and **contractual** obligation on the part of the petitioner. This continuing, legal and **contractual** obligation was in effect during 1931. Under the principles laid down in *Douglas v. Willcuts*, 296 U. S. 1, the \$4800.00 used by the petitioner to satisfy that obligation during that year is taxable to him.”

Section 331, R. S. Mo. 1929 (same as Section 359, R. S. Mo. 1909), provides:

“Divorce, When and When Not a Bar.—If any woman be divorced from her husband, for the fault or misconduct of said husband, she shall not thereby lose her dower; but if the husband be divorced from the wife, for her fault or misconduct, she shall not be endowed.”

Section 1358, R. S. Mo. 1929 (same as Section 2378, R. S. Mo. 1909), provides:

“Divorce Affects Guilty Party, How.—In all cases of divorce from the bonds of matrimony, the guilty party shall forfeit all rights and claims under and by virtue of the marriage.”

This includes alimony. McIntire v. McIntire, 80 Mo. 470; Wade v. Wade, 229 S. W. 432; Rhoades v. Rhoades, 342 Mo. 934, l. c. 941.

In Missouri if a wife secures a divorce from her husband and alimony is allowed her, and she thereafter remarries, she is not entitled to further alimony after her remarriage. Nelson v. Nelson, 292 Mo. 412.

On the record, the **law** of Missouri imposed no obligation or duty upon Mr. Tilles (petitioner herein) as a **marital obligation** to support his former wife, in 1931 and 1932, and Douglas v. Willcuts therefore does not apply.

As we understand Douglas v. Willcuts, where there is a predivorce agreement under the terms of which a certain income is allotted to the wife by her husband because of his duty to support her and she thereafter secures a divorce from him, and the court in which the divorce is secured continues to have power and jurisdiction to alter, amend or enforce the predivorce agreement, the income derived by the wife under the predivorce agreement is but the payment by the husband of an obligation which the **law** con-

tinues to impose upon him, notwithstanding the divorce, and therefore the income paid the wife is but money used by the husband to discharge that obligation. The gist of the Douglas opinion is the **reserve power** in the Court **after the decree of divorce**, to **enforce** the husband's **continuing obligation to support his wife, by virtue of that duty imposed upon him by law**, notwithstanding and regardless of the predivorce agreement, not because of the **predivorce agreement**.

The predivorce agreement is but **security** for the obligation of the husband imposed by law. The predivorce agreement is not a contractual obligation **wholly disassociated** from the husband's obligation to support his wife imposed by law. So far as determining the question of income, the predivorce agreement is of no moment.

The Circuit Court of Appeals, we respectfully suggest, inadvertently failed to note the distinction, as we have just pointed out, between the predivorce agreement and the reserve power of the trial court in the divorce proceedings before it.

The Court of Appeals' opinion rests squarely upon the predivorce agreement as imposing an obligation upon Mr. Tilles to continue to support his former wife by payment of alimony in 1931 and 1932 and **not the reserve power** in the Circuit Court of the City of St. Louis to **compel, by order** in 1931 and 1932, Mr. Tilles to pay his former wife alimony.

The enforcement of the agreement of May 12, 1909, in the present case doesn't rest and could not rest upon any obligation imposed under the **law** of Missouri for Mr. Tilles to support his former wife as a result of their marital relations in 1931 and 1932, for the Circuit Court of the City of St. Louis had no jurisdiction or authority to make or enforce any such order upon Mr. Tilles.

The Court of Appeals in its opinion affirming the ruling of the Board of Tax Appeals held as follows:

“The pre-divorce agreement of May 12, 1909, created a continuing, legal and contractual obligation on the part of petitioner. This continuing, legal and contractual obligation was in effect during 1931. Under the principles laid down in *Douglas v. Willcuts*, 296 U. S. 1, the \$4800.00 used by petitioner to satisfy the obligation during that year is taxable to him.”

In the foregoing pronouncement we respectfully suggest that the Court of Appeals is in error. *Douglas v. Willcuts* does not hold, that where there is a predivorce agreement in favor of the wife and the wife secures a divorce and thereafter remarries and the laws of the state in which the divorce is secured, upon such remarriage, absolves the husband from paying further alimony to the wife, that the predivorce agreement constitutes a continuing, binding, contractual obligation upon the husband.

Neither does *Douglas v. Willcuts* hold that where a husband sues his wife for divorce and makes a predivorce agreement with his wife to pay her alimony, under the mistaken idea that such obligation is imposed upon him by the law of the state, when it is not, and the wife thereafter remarries, that the predivorce agreement under the law of the state in question constitutes a continuing and binding contractual obligation upon the husband.

Under the laws of the State of Missouri the agreement of May 12, 1909, could not in 1931 and 1932 have been enforced against Mr. Tilles, as a binding contractual obligation, predicated upon his duty to pay the former Mrs. Tilles alimony. The cases cited in the opinion of the Circuit Court of Appeals to the effect that a predivorce agreement can be enforced, after a divorce decree, are cases where the wife secured the divorce.

Petitioner has never denied and does not now deny that the agreement of May 12, 1909, was binding upon him. He considered it binding upon him because he received from

his wife valuable securities belonging to her and in exchange for which he agreed to pay her the \$4,800.00 per year (Trans., last par., p. 39). No principle laid down in *Douglas v. Willcuts* applies to any such agreement.

The agreement rests solely upon a financial consideration, and not upon Mr. Tilles' duty to pay his former wife alimony in 1931 and 1932.

The net result of the transaction of May 12, 1909, was that Mr. Tilles took Mrs. Tilles' securities and agreed to pay her \$100,000, during her lifetime, absolutely upon his death, and interest thereon at the rate of 4.8 per cent per annum until paid.

What Mrs. Tilles did was to exchange her securities for the financial responsibility of her former husband, together with the supporting securities deposited with the trust company, to secure performance of his agreement. So far as the marital relations were concerned, the agreement might have been made between a man and woman unmarried.

The point in the record is this: That since the agreement in 1931 and 1932 could not be supported by Mr. Tilles' obligation to support his wife as a result of the marital relation, but was and can be supported by a valuable consideration moving from Mr. Tilles to Mrs. Tilles, the case of *Douglas v. Willcuts* does not apply, but the following sections of 1928 and 1932 do, viz.:

Section 23 of the Revenue Act of 1929 (U. S. C. A., Title 26, Section 23, p. 125), which was effective for the year 1931, and which is as follows:

“In computing net income there shall be allowed as deductions:

“(b) **Interest.** All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and

originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.”

And under Subsection (b) of Section 23 of the Revenue Act of 1932 (U. S. C. A., Title 26, Section 23, p. 125), covering the year 1932, which is as follows:

“In computing net income there shall be allowed as deductions:

“(b) **Interest.** All interest paid or accrued within the taxable year on indebtedness, except (1) on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from the taxes imposed by this title, or (2) on indebtedness incurred or continued in connection with the purchasing or carrying of an annuity.”

Viewing the transaction as a sale and purchase of the securities in question by Mr. Tilles for \$100,000, the agreement of May 12, 1909, was simply the equivalent of a promissory note payable on a fixed and determined date, with the obligation upon Mr. Tilles to pay interest monthly, at the rate of 4.8 per cent per annum.

Mr. Tilles had the option of paying \$100,000 to Mrs. Tilles at any time during his lifetime. The moment he did that all obligations ceased on his part, which, in and of itself, is conclusive that *Douglas v. Willcuts* does not apply.

The Court of Appeals' opinion rests squarely upon the contract or agreement of May 12, 1909, and Mr. Tilles' alleged obligations arising out of that contract. Whereas, the decision in the *Douglas* case rests not upon the pre-divorce agreement, but upon the husband's obligation imposed upon him **by law** to support or pay alimony to his wife during the taxable year in question.

The Court of Appeals fails to note the distinction that we have pointed out and therein fails to correctly apply the principles announced in *Douglas v. Willcuts*.

The correct application of the principles in *Douglas v. Willcuts* on this record, in the last analysis, depends upon the consideration which supports the contract or agreement of May 12, 1909. If the consideration which supported the contract in 1931 and 1932 was Mr. Tilles' obligation to support his former wife imposed upon him by law, then *Douglas v. Willcuts* applies. If the consideration which supported the legality of the contract and made it a continuing, contractual obligation upon Mr. Tilles in 1931 and 1932 were the securities that he received from Mrs. Tilles, then the principles laid down in *Douglas v. Willcuts* do not apply; the annual payments being but interest upon a financial debt owed by Mr. Tilles to his former wife and deductible under the Revenue Acts of 1928 and 1932.

The record shows that the parties themselves did not treat the annual payments as a discharge by petitioner of his marital obligations, because, if they were, petitioner's former wife would not have returned the annual payments as taxable income.

Respectfully submitted,

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